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Supreme Court of the United States

OCTOBER TERM 1956

No. 967

CHARLES A. HASKELL, *Petitioner*

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Charles A. Haskell, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming the judgment of the United States District Court for the District of Colorado.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Tr. 4) is reported at 241 F. 2d 790.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1957 (Tr. 4-15). A petition for rehearing was

denied by said Court March 5, 1957, (Tr. 24). On March 8, 1957, an order was entered staying the mandate of the Court of Appeals for a period of 30 days. (Tr. 24). Leave was granted to file a Second Petition for Rehearing on March 26, 1957, (Tr. 24). Under date of March 26, 1957, an order was entered by Charles E. Whittaker, Associate Justice of the Supreme Court of the United States extending the time for filing a petition for a writ of certiorari to May 4, 1957. The Court of Appeals on April 5, 1957, denied the Second Petition for Rehearing and entered its order staying its mandate through May 5, 1957, (Tr. 29). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether conviction of a taxpayer for willful failure to file an income tax return on time can stand, where willfulness was the only controverted issue and the instruction on willfulness was ambiguous, invited the jury to find a bad purpose not in evidence, and told the jury, contrary to principles established by decisions of this court, that willful meant no more than voluntary, intentional and deliberate?

2. Whether neglect to file his personal income tax return on time by a taxpayer will support a finding of the bad purpose constituting willful failure to file, where his partnership return, withholding statement of his employer and his own declaration of estimated tax were timely filed and disclosed greater income than his net taxable income for the year in question and where almost two years prior to institution of criminal action against him alleging willful failure to file, he had voluntarily filed returns and paid balance of taxes with interest and civil penalties?

3. What is the effect of the amendment of Section 145 (a) of the Internal Revenue Code (1939) by the Current Tax Payment Act of 1943 upon the elements of the crime of omission to file tax returns defined by such Section, and

further, is an indictment which charges only that the taxpayer knowingly and willfully failed to make a return, sufficient under said Section as so amended?

4. Whether an extension of time for filing a return, granted by a Collector of Internal Revenue under delegated authority, is effective to extend the period of the Statute of Limitations applicable to the offense of willful failure to file at the time required, where the granting of the extension is discretionary and conditioned upon the later filing of the return and the payment of interest from the statutory due date, and where the indictment was found more than the limitation period after the statutory due date?

5. Whether a Court of Appeals, having permitted the filing of a Second Petition for Rehearing, can properly deny such petition without correcting its opinion where the petition set forth the record calling the court's attention to errors of fact upon which it had based its decision, where such correction would require reversal of petitioner's conviction for the reason that the prosecution was barred by the Statute of Limitations and where the bar of the Statute had been urged throughout the trial and on appeal.

STATUTES INVOLVED

Internal Revenue Code of 1939: Sec. 145 (a). Penalties.

(a) *Failure to File Returns, Submit Information, or Pay Estimated Tax or Tax.*—Any Person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties pro-

vided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution. 26 U.S. C. 1946 ed., Sec. 145 (a)

*26 U.S.C. 1946 ed., Sec. 53 (a) (1) and (2)
(Time and Place for Filing Returns)

*26 U.S.C. 1946 ed., Sec. 3612 (a)
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*Ruling of Commissioner of Internal Revenue, 1947-15-12593, Mimeograph 6157, Sec. 5. Internal Revenue Bulletin, Cumulative Bulletin 1947-2, page 54.

*26 Code of Federal Regulations 601.12 (g)
(Procedure—Granting of Extensions of Time)

*Regulations 111, Income Tax, I.R.C., Sec. 29.53-2
(Delegation of Authority—Extensions of Time)

STATEMENT

Petitioner, Charles A. Haskell, was defendant in a criminal proceeding in the United States District Court at Denver, Colorado brought under Section 145 (a) of the Internal Revenue Code of 1939 charging him with willfully and knowingly failing to make an income tax return for the year 1951. This indictment was filed September 14, 1955. (R. 3)

The evidence showed that during and for the year in question, 1951, petitioner had filed his Declaration of Esti-

*See Appendix.

mated Tax, Form 1040 ES, estimating thereon his 1951 income tax liability and the tax to be withheld by employers, remitting the unpaid balance of $3,500.00 (Gov't. Ex. 8 Exs. p. 47, R. 44). An employer, the O.K. Ko-Op Rubber Welding System, with the knowledge of petitioner, had filed a timely W-2 form showing the amount of salary paid to petitioner during 1951 and the amount of tax withheld therefrom, $2,020.14, which was remitted to the Government (R. 63-64 and Gov't. Ex. 1, Exs. p. 1, R. 44). The petitioner also knew that the law partnership of which he was a member, Haskell and Crandell, had prepared and filed a timely 1951 Partnership Return, Form 1065, (Gov't. Ex. 12, Exs. p. 51, R. 44) showing on Schedule K petitioner's share of the partnership income (R. 94-95).

The 1951 income of the taxpayer thus disclosed to the Government by the petitioner or on behalf of petitioner with his knowledge, by the timely filing of the three separate tax returns above-mentioned, was $33,901.34, an amount which was in excess of his actual 1951 net taxable income of 32,416.14, upon which he paid tax when the return was filed (Gov't. Ex. 1, page 7, line 5, Exs. p. 1, R. 44).

Two requests for extension of time for filing his personal return, Form 1040, for 1951 were filed by petitioner and granted by the Collector to the dates requested, the last extension being to July 15, 1952 (Gov't. Ex. 22, pp. 90-93, Exs. p. 88, R. 48). The petitioner failed to file his return by that date. In each of these instances the request for extension was received and the extension granted prior to the expiration of the time for filing, and the extension was in each case granted to the date requested. A third request for extension was received by the Collector July 16, 1952, the day after the expiration of the prior extension, requesting extension to August 15, 1952 (Gov't. Ex. 22, p. 89, Exs. p. 88, R. 48). Under date of July 21, 1952, 5 days after the default of the petitioner, the Collector issued a letter stating that

time for filing was extended to September 15, 1952 (*Ibid.*, p. 88).

The petitioner filed his 1951 return, Form 1040, on September 22, 1953 (Gov't. Ex. 1, Exs. p. 1, R. 44). This return was filed voluntarily; and the only evidence that filing of the return for this year was ever mentioned to petitioner by a Government agent was the testimony of Assistant Director of Internal Revenue, Thomas B. Lynch, that eight days before the return was filed, on September 14, 1953, he saw petitioner in the New Custom House waiting to see District Director Allan (R. 74), on what Allen agreed was business for a client of petitioner's (R. 82), that he had not called petitioner nor sent for him but just happened to see him there (R. 79), that he asked him if was possible that he had not filed this return and was told that petitioner was working on it and would have "them" in the next week (R. 74-75).

At the same time that he filed his 1951 return, Form 1040, petioner filed his 1040 returns for the years 1946 through 1950 (Gov't Exs. 2-6, Exs. pp. 8-34, R. 44). The Government's evidence also showed that petitioner had been late in the filing of his returns for 1944 and 1945 and that these had been filed on July 15, 1946 (Gov't. Exs. 29 and 30, Exs. p. 108, 151, R. 75). These returns were also filed voluntarily, and the only evidence that any of them were ever mentioned to petitioner by a Government agent was the testimony of Revenue Agent Eckmeyer that in May or June of 1951, more than two years before the 1946-51 returns were filed, he was assigned the 1948 Partnership Return of Haskell and Crandell (R. 99), that in connection therewith he talked with petitioner about his personal returns, that petitioner told him he had not filed his final 1040 returns for several prior years but that he would endeavor to obtain the information needed so that the returns could be filed, and that so far as he knew he had prepaid sufficient monies to cover any tax liability therefor (R. 100-101).

In the years prior to 1951, for which final 1040 returns were also filed on September 22, 1953, taxes had been withheld from petitioner's salaries, W-2 tax returns filed thereon accompanied by prepayment of such taxes, and partnership tax returns, Form 1065, had been filed disclosing petitioner's partnership earnings for such years. Petitioner's income had fluctuated and in some years no Declaration of Estimated Tax, Form 1040 ES., was filed, in others Declarations were filed. From Government Exhibits 1 through 6 and 29 and 30, (Exs. pp. 1-34, 146, 151, R. 44, 75) the following information appears from page one of the respective returns and from notations added upon examination by the Government (R. 65):

Return	Gross Income Shown by Return	Income Tax Shown by Return	Income Tax After Government Corrections	Total Tax Prepayment by Withholding and Payments on Declarations
1944	$21,300.44	$ 6,422.57	$ 6,422.57	$ 9,523.62
1945	21,097.44	6,344.36	6,344.36	10,462.05
1946	19,630.14	2,626.16	3,014.94	2,338.73
1947	14,330.36	1,087.48	1,087.48	86.60
1948	29,307.86	4,496.76	4,423.86	139.10
1949	18,228.45	1,166.90	1,162.06	623.20
1950	35,575.27	6,746.02	6,737.84	4,900.00
1951	43,518.75	10,804.24	10,804.24	5,520.14
Totals		$39,694.49	$39,997.35	$33,593.44

The foregoing exhibits also show interest and penalties for late filing, totaling $4,847.61, which, along with balance of taxes due, were paid by petitioner, (R. 46, 68).

On the same date, September 22, 1953, that he filed the 1040 return for 1951, petitioner filed his 1040 return for 1952, upon which his time for filing had been extended to September 15, 1953 (Gov't. Exs. 1 and 27). Attached to the return for 1951, as well as to the other returns filed with it,

was the late filing affidavit of the petitioner, Haskell, stating, in part:

> The difficulties mentioned started in the year 1947; at that time the business of the O.K. Ko-Op Rubber Welding System, of which affiant was and is an active official and legal counsel, practically went under due to the postwar reconversion in the tire industry; during most of 1947 and 1948 it was necessary for affiant to practically drop all other matters to assist in the extended efforts to rehabilitate that business and keep it from going under; which was accomplished. In that connection and as a result thereof this affiant was unable to keep current in the preparation of tax returns for a number of his clients and it was not until 1950 that affiant was able to prepare and file the tax returns for these clients for this same period of years and taxpayer felt that he could not look to his own arrearage until the arrearages of his clients had been cured;
>
> During these years * * * affiant underwent four changes in his legal and accounting firms, * * * affiant has not taken a vacation since 1941, from that date to the present time has worked not less than 12 hours per day, at least three nights per week, almost every Saturday, and at least three out of every four Sundays, * * *
>
> In each of the years covered * * * affiant has fully expected to get the returns prepared and filed within the time granted and then business matters have arisen necessitating taxpayer putting aside this work for the work of clients.
>
> During these years affiant has had to travel on business away from Denver extensively and on many of these trips affiant has packed his records along to work on these taxes while traveling, only to return and find a work accumulation which made it necessary to set this work aside;

In summary affiant states that this is probably the most humiliating experience of affiant's career, has been a source of constant worry and concern to affiant, • • •;

For the reasons stated affiant humbly petitions that penalties be sparingly asserted.

On September 14, 1955, indictment was brought against petitioner for alleged willful failure to file his 1951 income tax return. At the trial the Government proved the facts concerning the 1951 return and the returns for other years that have been recited. None of those facts were disputed. The Government also showed that petitioner, a lawyer and registered accountant in Colorado, represented clients before the Internal Revenue Service and was regarded by the Service personnel to be an expert (R. 76). It introduced evidence directed to showing that it was not impossible for him to have made the returns for 1951 and previous years on time and that he had on certain occasions engaged in recreational activities. Petitioner offered witnesses testifying to his good reputation for honesty, truth and veracity in the community, (R. 114, 117, 122, 129, 130) and himself testified to his activities and his intentions, that he intended to file his 1951 return and to file on time, and that the late filing affidavit summarizes the many reasons that kept him working day and night to the point that he just did not get it done (R. 141).

Evidence at the trial was that during all the time in question, petitioner had lived continuously at Englewood, Colorado, and had continuously practiced his professions of law and accountancy in Colorado (R. 136).

In a motion to dismiss the indictment filed prior to the trial, petitioner had asserted as one of the grounds therefor that prosecution was barred by the Statute of Limitations (R. 4). The motion to dismiss was denied (R. 5). The Statute of Limitations was again asserted as one ground

of petitioner's motion for a directed verdict of acquittal at the close of the government's case (R. 113) which was denied because the trial court was "satisfied that the Statute didn't begin to run until September 15, 1952" (R. 114). The Statute of Limitations was included in the reasons for motion for directed verdict of acquittal made by petitioner at the conclusion of the case, which was likewise denied (R. 156); and Point Number 2 of petitioner's Specification of Points Relied On, upon appeal to the Court of Appeals, was "The Prosecution was barred by the Statute of Limitations" (R. 1).

The Statute of Limitations was raised in the Petition for Rehearing filed by Petitioner in the Court of Appeals (Tr. 16); which Petition was denied. Thereafter the Court of Appeals granted leave to petitioner to file a Second Petition for Rehearing and a Second Petition was filed, asking for rehearing upon the ground that the prosecution was barred by the Statute of Limitations as disclosed by the uncontradicted evidence of the Government and pointing out that the opinion of the Court of Appeals on this question was predicated upon certain specified findings of fact that were contrary to the record (Tr. 25). This Second Petition was denied without written opinion or correction of the original opinion (Tr. 29).

REASONS FOR GRANTING THE WRIT

The conviction of the petitioner, and the appellate decision sustaining it, raise serious questions of wide application in the administration of justice under the criminal sanctions of the Internal Revenue Laws. The decisions below are in conflict with the legal principles established by decisions of this Court, and, further, involve important questions in the interpretation of the Federal Revenue Laws which have not been previously settled by this Court. The rights of the petitioner have been prejudiced to the extent that but for the errors on the part of the Court below, the petitioner

should have been acquitted. The failure of the Court of Appeals to correct fundamental errors in its opinion calls for the exercise of this Court's power of supervision.

1.

The decisions below conflict with the decisions of this Court by equating mere voluntary failure to act with the "willful failure" which is proscribed by the statute.

In *United States v. Murdock*, 290 U. S. 389, a prosecution under the predecessor sections of the Internal Revenue Code (Sec. 1114 (a) Revenue Act of 1926 and Sec. 146 (a) Revenue Act of 1928) for failure to supply information for the purpose of computation, assessment or collection of tax, where the petitioner refused to furnish such information because he feared prosecution under State Law, and where the trial court refused to charge the jury with regard to the good faith of the defendant as bearing on the question of willfulness, this Court laid down the rule, that although the failure was shown to be intentional, and without legal justification, the question of whether the failure was prompted by bad faith or evil entent must be submitted to the jury under proper instruction, since by proscribing only a "willful failure", Congress had made bad faith or evil intent an essential element of the offense. The decision carefully analyzed the meaning of the term "willful", and rejected certain definitions as not applicable to the section. In *Spies v. United States*, 317 U. S. 492, under the companion, felony, section of the Code, (Sec. 145 (b)), this Court reviewed the whole complex of civil and criminal sanctions imposed by Congress to enforce the tax laws, and reiterated the above principle enunciated in *Murdock v. United States, supra*, (317 U. S. 492, 498).

The courts below herein, although citing the Murdock case, clearly misconceived its principle. The instruction as to willfulness herein (R. 169) was confusing and ambiguous, and actually eliminated willfulness as an element of the

offense by telling the jury that the only bad purpose or bad motive necessary was the deliberate intention not to file a return which the defendant knew ought to be filed.

Receipt of income in excess of six hundred dollars and failure to file the return at the time required being conceded by petitioner (R. 141), the only issue before the jury was whether the failure was willful. The wandering and confusing instruction was:

> Now, "knowing" is used in the sense that you would use the word in ordinary conversation. It means intention and with awareness and consciousness of what one is doing. Now, the word "Willful" has a number of different meanings depending upon the context in which it is used. *As it is used in the subsection with which we are dealing here today "willful" means voluntary, purposeful, deliberate, and intentional as distinguished from accidental, inadvertent or negligent.* The Government must prove beyond a reasonable doubt that the defendant's failure to file the return was voluntary, purposeful, deliberate, and intentional and not accidental, inadvertent or negligent. The jury is instructed that this is a criminal proceeding and that the word "willful" when used in a criminal statute means an act done with a bad purpose or done without justifiable excuse or done stubbornly or obstinately, preversely with a bad motive. I instruct you then that the *only bad purpose or bad motive which it is necessary for the Government to prove in this case is the deliberate intention not to file a return which the defendant knew ought to be filed so that the Government would not know the extent of his liability.* (R. 169.) (Emphasis ours)

The trial court denied petitioner's tendered instructions reading:

> The word "willfully" means more than voluntarily or

> intentionally. When used in a criminal statute it means an act done with a bad purpose, with an evil motive (R. 175).
>
> You are charged that the late filing of a tax return required by law or regulations does not of itself constitute the offense charged against the defendant (R. 176).

Instead of profiting by this court's analysis in the *Murdock* case of the meaning of "willful," and instructing simply and clearly in accordance with it, the trial court herein used verbatim, an instruction, from *Yarborough v. United States*, 230 F. 2d 56, (C.A. 4). That instruction incorporated all of the definitions rejected by this court in *United States v. Murdock, supra,* then finally told the jury that the *only* thing which the government need prove, was *"the deliberate intention not to file a return which the defendant knew ought to be filed so that the government would not know the extent of his liability."* (Emphasis ours). (R. 170)

The phrase, "so that the Government would not know the extent of his liability", at the end of the instruction may mean either:

> To supply the required bad motive or bad purpose, the Government must prove that defendant intended to conceal from the Government the extent of his liability,

or it may mean:

> from Defendant's failure to file, a bad motive or bad purpose necessarily follows, namely, the concealment from the Government of the extent of his liability.

The word "only" invited the jury to adopt the second meaning and to conclude that the sole proof required to convict petitioner was that he failed to file on time a return which he knew was required. Since those facts were not denied by the petitioner, (R. 141) the instruction left no factual issue for the jury to decide. The ambiguity of the

instruction permits, and in fact, favors, a construction amounting to the supplying of a motive by direction of the court, a motive not found in nor supported by the evidence. In sum, the instruction defined willfulness as meaning no more than voluntary or intentional.

The Court of Appeals also succumbed to the same misconception of the rule of the *Murdock* case, witness the following language from its opinion on the question of the sufficiency of the evidence:

> Considered as a whole, the evidence together with the inferences fairly to be drawn therefrom was sufficient to warrant a finding that the failure to make the return for 1951 within the extended period *was not due to mere inadvertence, oversight or neglect, but was purposeful, deliberate, and willful.* (Emphasis supplied). (Tr. 12).

Thus phrased, the word willful is made synonymous with "purposeful" and "deliberate", and is stripped of the criminal connotation which this Court has attached thereto.

And again, in discussing the challenged instruction, the Court of Appeals states:

> The instructions made it *crystal clear* to the jury that his failure to file such a return was *purposeful, deliberate, and intentional* and not *accidental, inadvertent or negligent.* (Emphasis ours). (Tr. 14)

Again the synonyms used are the very ones rejected by this Court, as applying to this particular offense, in the analysis in the *Murdock* case.

The Trial Court repeatedly curtailed counsel for the defense in the course of his examination of the petitioner and the witnesses called by the defense, restricting the scope of the proof offered by petitioner to show that his failure was not tinged with bad faith or evil intent. Remarks made by the Trial Court in the presence of the jury (R. 115, 130-

131, 143), showed beyond dispute the lack of understanding of the *Murdock* decision under which the court was laboring. The attitude of judicial skepticism toward the defense which pervaded the trial as a result of the Court's misconception might have been counteracted had a clear and accurate instruction on the issue of willfulness been given, but the deficiencies of the instruction actually given were aggravated by the Court's remarks and vice versa.

The decisions in this case indicate how the lower Federal Courts are drifting away from the principles enunciated by this Court in this class of cases, a drift which, unless checked, will whittle down to the point of nullity the Congressional intent expressed in the use of the term "willful" as an element of the offense.

2.

Petitioner was convicted of "wilful" failure to file a timely 1951 return under Section 145 (a), I.R.C. (1939) despite: acts of petitioner disclosing to the Government his identity as a taxpayer and necessarily evidencing in and of themselves his intention to file the return; timely submission to the Government of information disclosing petitioner's 1951 income to an extent exceeding the net amount upon which he was taxable; substantial prepayment of the tax liability; and voluntary filing of the return and payment of the balance of tax with interest and civil penalty; and despite the absence of any fact pointing to bad faith or evil intent. (Statement supra). No prior case involving similar facts can be found. The case involves factors under the "pay as you go" income tax system, and attempts to found criminal intent on a cumulation of non-criminal prior acts, important questions not heretofore passed upon by this Court.

Sections 5 (a) and 5 (c) of the Current Tax Payment Act of 1943 (Internal Revenue Code, 1939, as amended) injected a new element into Section 145 (a) which is related to and bears directly on the question of willfulness as used in that

Section. The effect of the amendment has not yet been decided by this Court and was not anticipated by the earlier decisions in *Murdock v. United States,* supra, and *Spies v. United States,* supra, as is evident from the statement in the latter at page 495 of 317 U. S., that:

> The United States has relied for the collection of its income tax largely upon the taxpayer's own disclosures rather than upon a system of withholding the tax from him by those from whom income may be received . . .

We believe that this amendment of Section 145 (a) of itself justifies the granting of certiorari in the present case where timely disclosure was made to the Government of petitioner's income to an extent in excess of his undisputed net taxable income for the year in question by way of the filing of a W-2 withholding return (lines 2 and 6 (A) of Gov't. Ex. 1, Ex's. p. 1, R. 44), the filing of a 1040 ES declaration return (Gov't. Ex. 8 Exs. p. 47, R. 44) and the filing of a 1065 partnership return. (Schedule K, line (a), Col. 3, (Gov't. Ex. 12, Ex's. p. 53, R. 44). Possessed of this information, the Government at any time after July 15, 1952, could have assessed and collected a tax greater than petitioner's actual tax liability, under 1939 Internal Revenue Code Section 3612, which provides in part that if any person fails to make and file a return at the time prescribed, the collector shall make the return from his own knowledge and from such information as he can obtain, and that the Commissioner shall determine and assess all taxes as to such returns.

Petitioner, well aware that an arbitrary assessment could be made upon the income so disclosed by him to the Government, and that if his prepayments by W-2 and 1040 ES returns did not fully pay the tax he would have to pay interest and perhaps civil penalties on the deficiency, could not hope to gain by his delay in filing the return.

If we assume arguendo that the Court of Appeals regarded bad purpose as essential, (although in appraising the sufficiency of the evidence that Court did not once mention bad or evil purpose, motive or intent), it would appear that bad purpose was inferred from the fact set forth in the opinion (Tr. 11) that petitioner failed to make his returns for the years 1946 to 1952, inclusive, until September 22, 1953. The reference to these late filings of other years (Tr. 11) includes reference to the late filing of the return for 1952, as did also the Trial Court's charge to the jury on like transactions (R. 170), although the 1952 return could have no relation to failure to timely file the return for 1951. Similarly the Court of Appeals erred in ignoring the evidence concerning the returns for 1944 and 1945 when it compared prepayments for delinquent years with aggregate tax liabilities (Tr. 11).

Since prepayment was principally upon estimates made before determination of petitioner's income from his principal source, his law partnership, such a comparison discloses nothing concerning intent. For what it is worth, the true ratio of prepayment to tax liability was approximately 84%. (See Chart in Statement, supra, omitting return for 1952 and ignoring possible refund as unrelated to the purpose of the comparison).

Mere late filing alone does not constitute the offense *United States v. Murdock*, supra. No one of the several late filings constituted an offense. And the cumulation of the several cannot supply the missing element of wrongful intent. In defining the offense under Section 145 (a) Congress provided that it should be a "willful" failure to file, not a "repeated" one. By permitting willfulness to be inferred from other failures, with no evidence of bad purpose or evil motive as to any of the failures, the decision below has opened the door for prosecution of a new crime in which repetition infers willfulness, and inference of bad motive in failure to file is built upon inference that bad motive existed for other failures.

3.

In refusing to grant petitioner's motion to dismiss the indictment, and in sustaining such action, the courts below have ignored established principles of criminal justice and have incorrectly decided the effect of the amendments to the Internal Revenue Code introduced into the law by the Current Tax Payment Act of 1943, in an interpretation which potentially effects many taxpayers and which has not previously been settled by this Court.

The Statutory offense consists of multiple ingredients and it is of ancient origin that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment or the indictment will be bad. *U. S. v. Cook,* 17 Wall 168.

Three of the ingredients of the offense defined by Section 145 (a) are missing from the indictment herein (R. 3).

First, the words "law *or regulations*" occur twice in the Statute, yet the word "regulations" is entirely missing in the indictment. Bearing in mind: that the only due date provided by law for the filing of an individual calendar year tax return for 1951 was *March 15, 1952,* that the indictment charges that petitioner "was required *by law,* after the close of the calendar year 1951 and on or before *September 15, 1952,* to make an income tax return"; that the indictment shows on its face that it was returned *September 14, 1955;* we submit that the indictment is defective on its face, since the claimed due date is not the due date provided by law and therefore can only rest on some "regulations", not averred.

Second, the indictment charges petitioner's failure "to make said income tax *return*" whereas the pertinent words of the Statute as so amended, twice occurring therein, are to make "a *return or declaration*". Thus the indictment herein charges but half a crime. It is to be noted that Section 145 (a) was amended by the Current Tax payment Act

of 1943, Section 5 (c), and the words "or declaration" were inserted. There has been no judicial interpretation of the Section subsequent to this amendment. This Court in *Spies v. United States,* supra, characterized the crime as one of "omission". The established rule in criminal law relating to a Statute creating a crime of omission, wherein the word "or" is used, is that the Defendant is not guilty if he performs either of the acts separated by the disjunctive. It is well established that in construing a statute subject to more than one meaning, that construction which favors the position of the defendant is preferred.

Third, the indictment charged only that petitioner "failed to make said income tax return," (R. 3) whereas the statute specifies, failure to file "at the time or times required by law or regulations". (I.R.C. 1939, Sec. 145 (a)). It is an admitted fact that the return in question was actually filed by petitioner (Gov't. Ex. 1, Exs. p. 1, R. 44). Moreover, this time factor is of the essence where, as here, the bar of the Statute of Limitations was in issue (infra).

4.

The Government and the petitioner agreed (R. 17) that the applicable Statute of Limitations was Section 3748 (a) of the Internal Revenue Code of 1939 and the Court of Appeals so held (Tr. 10). That Section prohibits prosecution unless the indictment be returned within three years next after the commission of the offense. The indictment here was filed September 14, 1955 (R. 3) and if the offense was committed at any time prior to September 15, 1952, the prosecution was barred.

The return in question was for the calendar year of 1951 and was due on March 15, 1952 according to Section 53 (a) I.R.C. 1939. The same Section provides that the Commissioner may grant a reasonable extension of time for filing, but the statute defines no circumstances under which an extension will or will not be granted, and the rules and

regulations adopted by the Commissioner in his attempted redelegation of authority to the Collectors (now District Directors) to grant the extension do not set up any standards to control the discretion of this official. (Reg. 111, I.R.C. Sec. 29.53-2). Thus the extension is not a matter of right regardless of the reasons for the request or the procedure followed, and application for it by a taxpayer does not have any effect upon the date established by law for filing a return; nor is the Commissioner required to grant any extension which has been requested.

Under such circumstances, it is clear that the granting of an extension is no more than an administrative device which does not change the basic law requiring the filing of returns by a certain date, penalizing the failure to file at that time, and providing a statutory period of limitation within which the penalty must be asserted. If it were otherwise it would be an unconstitutional delegation of legislative power to the Commissioner and to the Collector.

That the above interpretation is the one accepted by the Commissioner is clear from the fact that even where an extension is granted, it is conditioned upon the filing of the return and the payment of interest from the statutory due date to the date of payment, (Mim. 6157 Sec. 5, issued under authority of Regulations 111.)

That the above interpretation is the one intended by Congress is shown by the fact that in the 1954 Internal Revenue Code, Congress specifically provided that, for the purpose of determining the period of limitations on criminal prosecution, the last date prescribed for filing the return shall be determined *without* regard to any extension of time granted the taxpayer. (Sec. 6531 and Sec. 6513 (a) I.R.C. 1954).

5.

The refusal of the Court of Appeals to correct patent errors of fact in its findings and upon which it based its

decision that the prosecution was not barred by the Statute of Limitation, and its failure to rule upon this vital question in the light of the true facts, after it had permitted the filing of a Second Petition for Rehearing calling its attention to such errors, was an unexplainable departure from proper appellate jurisprudence. The facts were matters of record introduced by the government and cannot be disputed. The bar of the Statute had been urged at every step of the proceeding in the trial court, and again in the Court of Appeals. In view of the established rules that the plea of the Statute of Limitation goes to the merits, *U.S. v. Barber,* 219 U.S. 72, that the plea was in issue by plea in bar *U.S. v. Oppenheimer,* 242 U.S. 85, and under the general issue *U.S. v. Cook,* 17 Wall 168; *U.S. v. Kissel,* 218 U.S. 601, that the Statute of Limitation is to be construed in favor of the accused, *U.S. v. Scharton,* 285 U.S. 518, 522, the fact that certain evidence in the record had not theretofore been singled out for argument could surely not be a proper ground for refusal of the court to consider the bar established by the facts.

The errors were the findings of the Court of Appeals that petitioner had "*seasonably* made three successive requests for extension of time within which to make his return for 1951" (TR.9); that "the last request was for an extension to September 15, 1952" (TR. 9); that the extensions "*effectively* extended to September 15, 1952; the time for filing" (TR. 10); and that "there was no default in the filing of the return prior to that time." (TR. 10).

The true facts appear on the face of the Government's Exhibits. The Collector had extended Petitioner's time for filing his 1951 return 1040 to July 15, 1952, (p. 91 of Gov't. Ex. 22, Exs. p. 88, R. 48). The petitioner failed to file such return on or before that date (p. 89 of Gov't. Ex. 22, Exs. p. 88, R. 48). As of July 16, 1952 the petitioner was in default, the act or acts necessary to constitute the offense were complete, and the Statute of Limitations began to run from

that July 16, 1952 date, *Bowles v. United States,* 73 F. 2d. 772, (C.A. 4), *United States v. Irvine,* 98 U.S. 450. And, citing applicable words in *Charters v. United States,* 289 F. 63, (C.A. 7), where a conviction was reversed on similar grounds, "Concerning these transactions and their dates, the record is conclusive, and the defendant has, so far as they are concerned, brought his case within the protection of the Statute."

After such failure of petitioner to file his return on or before the due date of July 15, 1952, petitioner filed a third request for extension of time to August 15, 1952, this third request being filed with the Collector on July 16, 1952 (Gov't, Ex. 22, p. 89, Exs. p. 88, R. 48). It is to be noted that this third request was not seasonably made and that the Regulation then in force governing the granting of extensions of time provided:

> Written application for extension must be received on or before the date prescribed by law for the filing of the return or declaration as the case may be (26, C.F.R. Regulations 601.12 g).

Notwithstanding this limitation on his authority in granting extensions, the Collector, of his own motion, issued a letter of extension on July 21, 1952, (p. 88 of Gov't Ex. 22, Exs. p. 88, R. 48), after petioner had been in default for 5 days, undertaking to extend petitioner's filing time to September 15, 1952, a date 30 days beyond that even requested by petitioner in his delinquent request.

This last purported extension to a date 30 days beyond the date requested, based on a delinquent request and issued contrary to the applicable Regulation, was a nullity and did not effectively extend the time for filing to September 15, 1952.

Pertinent to this assertion is a quote from *State v. Locke,* 73 W. Va. 713, 81 S.E. 401, 1914, citing and following *U.S. v. Irvine,* supra, enunciating the well settled law,

> It is a rule of general application, especially in criminal prosecutions, that, when once begun, the Statute of Limitations does not cease to run but continues uninterrupted save only by indictment, . . . and after it has commenced to run it cannot be interrupted, by the happening of any subsequent event or disability . . . See also 16 C.J. 228, Sec. 349; 22 C.J.S. 355-360, Secs. 226 and 228; 15 Am. Jur. 33, Sec. 345.

Even if it be contended that the tardy and unauthorized third extension tolled the Statute from the July 21, 1952 date of its issuance to September 15, 1952, the Statute did run for the 5 day period from July 15 to July 21, 1952, and this would be fatal to the Government's case which rested on an indictment found September 14, 1955.

It is clear however, that the Statute started to run July 16, 1952 and the action was barred under the Statute on July 16, 1955, three months, less two days, before the indictment was returned.

In view of the provision in the 1954 Internal Revenue Code, making it clear that extensions of time for filing a return do not affect the running of the limitation period (ante) it may be contended that the Statute of Limitation questions in this brief are gradually becoming moot since only a limited (although unknown) number of taxpayers remain to be judged without the benefit of this express clarification—those charged with an offense under the Revenue Laws occurring before the effective date of the 1954 Code. Certainly the question is not moot for Petitioner, a respected (R. 114, 117, 122, 129, 130) and successful professional man whose career cannot help but be irreparably damaged by the stigma of conviction and whose practice inevitably would suffer even greater damage during a period of incarceration. It is of even greater concern, and a matter of general importance to the administration of criminal justice, if an appellate court may so ignore its own errors as to undisputed facts when their correction would require reversal and acquittal of a defendant.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX

Statutes:

Internal Revenue Code of 1939:

SEC. 53. TIME AND PLACE FOR FILING RETURNS.

(a) *Time for filing.*—

(1) *General rule.*—Returns made on the basis of the Calendar year shall be made on or before the 15th day of March following the close of the calendar year, except that in the case of the return of the fiduciary of an estate or trust, the return shall be made on or before the fifteent hday of April following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the fifteenth day of the third month following the close of the fiscal year, except that in the case of the return of the fiduciary of an estate or trust, the return shall be made on or before the fifteenth day of the fourth month following the close of the fiscal year. (26 U.S.C. 1945 ed., Sec. 53 (a) (1)).

(2) *Extension of time.*—The Commissioner may grant a reasonable extension of time for filing returns, under such rules and regulations as he shall prescribe with the approval of the Secretary. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months. (26 U.S.C. 1946 ed., Sec. 53 (a) (2)).

SEC. 145. PENALTIES.

(a) *Failure to File Returns, Submit Information, or Pay Estimated Tax or Tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any

records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution. (26 U.S.C. 1946 ed., Sec. 145 (a)).

SEC. 3612. RETURNS EXECUTED BY COMMISSIONER OR COLLECTOR.

(a) *Authority of Collector.*—If any person fails to make and file a return or list at the time prescribed by law or by reglation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise. (26 U.S.C. 1946 ed., Sec. 3612 (a)).

SEC. 3748. PERIODS OF LIMITATION.

(a) *Criminal Prosecutions.*—No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense. . . (26 U.S.C. 1946 ed., Sec. 3748 (a)).

Internal Revenue Code of 1954:

SEC. 6531. PERIODS OF LIMITATION ON CRIMINAL PROSECUTIONS.

No person shall be prosecuted, tried or punished for any of the various offenses arising under the internal revenue laws unless the indictments found . . . within 3 years next after the commission of the offense . . . For the purpose of determining the periods of limitation on criminal prosecutions, the rules of Section 6513 shall be applicable. (26 U.S.C. Sec. 6531).

SEC. 6513. TIME RETURN DEEMED FILED AND TAX CONSIDERED PAID.

(a) . . . For purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer and without regard to any election to pay the tax in installments. (26 U.S.C. Sec. 6513 (a)).

Rules and Regulations:

Ruling of Commissioner of Internal Revenue, 1947—15—12593, Mimeograph 6157.

SEC. 5 INDIVIDUAL INCOME TAX RETURNS.

Collectors are authorized to grant extensions of time for filing individual income tax returns, conditioned upon the filing of a return on Form 1040 and payment of interest upon the tax, plus any additions thereto, from the due date of the return to date of payment. . . (Internal Revenue Bulletin, Cumulative Bulletin 1947-2, page 64).

26 Code of Federal Regulations 601.12 Procedure—

(g) *Extensions of time.* Under certain circumstances, the Commissioner is authorized to grant a

reasonable extension of time for filing an income tax return or a declaration of estimated tax. This authority has been delegated to the several collectors. The total period for extensions with respect to a return or declaration in the case of a taxpayer cannot be in excess of 6 months, except in the case of taxpayers who are abroad. Written application for extension must be received by the collector on or before the date prescribed by law for filing the return or declaration, as the case may be. Generally, in the case of corporations, one-fourth of an estimated tax on a tentative return must be paid on or before the date prescribed by law for filing the return as a condition precedent to the granting of an extension of time for filing the return. An extension of time for filing the declaration of estimated tax automatically extends the time for paying the estimated tax (without interest) for the same period.

Regulations 111, Income Tax, I.R.C.

SEC. 29.53—2. EXTENSIONS OF TIME FOR FILING RETURNS.

It is important that the taxpayer render on or before the due date a return. . . However, the Commissioner is authorized to grant a reasonable extension of time for filing returns under such rules and regulations as he shall prescribe with the approval of the Secretary. Accordingly, authority for granting extensions of time for filing income tax returns is hereby delegated to the various collectors of internal revenue.

Opinion of Court of Appeals:

United States Court of Appeals

TENTH CIRCUIT.

No. 5428—January Term, 1957

CHARLES A. HASKELL,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Colorado

(February 18, 1957)

Anthony F. Zarlengo (Fred M. Winner was with him on the brief) for Appellant.

John S. Pfeiffer, Assistant United States Attorney, (Donald E. Kelley, United States Attorney, was with him on the brief) for Appellee.

Before BRATTON, Chief Judge, and HUXMAN and PICKETT, Circuit Judges.

BRATTON, Chief Judge.

The indictment in this case—drawn under 26 U.S.C.A. S 145(a)—charged that during the calendar year 1951, Charles A. Haskell, a resident of Colorado, received gross income in the amount of $43,518.75; that by reason thereof he was required by law, after the close of the calendar year 1951 and on or before September 15, 1952, to make an income tax return; and that well knowing all of such facts,

he wilfully and knowingly failed to make such return. A jury found the defendant guilty, and the court sentenced him to imprisonment for a period of six months and to pay a fine of $5,000. From such judgment and sentence this appeal was seasonably perfected.

It is urged that the court erred in denying the motion to dismiss the indictment for failure to charge that wilful failure to make the income tax return existed at the time the making of such return was required. While presented on a broad basis, the focal point of the argument in support of the contention is that wilful failure to make the return at the time the making thereof was required was an essential element of the offense laid in the indictment; that the indictment failed to charge wilfulness at such time; and that the omission of such element from the charging part of the indictment was fatal. The indictment charged that appellant was required to make a return on or before September 15, 1952; and it further charged that he wilfully and knowingly failed to make it. Considered as a whole, the indictment charged in language too clear for doubt that wilful failure to make the return existed at the time the making thereof was required.

The further ground of challenge to the action of the court in denying the motion to dismiss the indictment is that under Sectiond 145(a), supra, the wilful failure to make a declaration of estimated tax and the wilful failure to make a return constitute an offense; that the failure to make only one of the two does not constitute an offense; and that since the indictment charged only the wilful failure to make a return, it was fatally defective. Punctuation in the statute and legislative history in connection with the statute are relied upon to sustain the contention. Punctuation is one factor to be accorded appropriate consideration in the interpretation of an obscure or doubtful statute, but it is not always controlling; and if necessary in order to

arrive at the legislative intent, a court will disregard punctuation. Hammock v. Loan & Trust Co., 105 U.S. 77; United States v. Lacher, 134 U.S. 624; Ford v. Delta and Pine Land Co., 164 U.S. 662; Stephens v. Cherokee Nation, 174 U.S. 445; Barrett v. Van Pelt, 268 U.S. 85; United States v. Shreveport Grain & Elevator Co., 287 U.S. 77; Costanzo v. Tillinghast, 287 U.S. 341; Chicago, M. & St. P. R. Co. v. Voelker, 129 F. 522; Egyptian Supply Co. v. Boyd, 117 F. (2d) 608. And where doubt exists repecting the meaning of a statute, the legislative history may be taken into consideration in resolving the doubt. But that is only one rule and it may be invoked only in case of ambiguity or uncertainty in respect to the language used. Where the language used is clear, there is no need to refer to legislative history. Ex parte Collett, 337 U.S. 55; Nicholas v. Denver & Rio Grande Western Railroad Co., 195 F. (2d) 428. There is no doubt, uncertainty, or obscurity respecting section 145(a). Other provisions in revenue legislation place upon certain persons two separate and distinct duties. One is to make a declaration of estimated tax and the other is to make a return. The two duties co-exist and they are not alternatives or substitutes for each other. A taxpayer is not free to discharge one of such duties and ignore the other. And under the plain terms of section 145(a), the wilful failure to make a return within the time required by applicable law or regulations constitutes an offense. Therefore no occasion arises to explore the field of punctuation or legislative history in connection with the statute.

An additional point of challenge to the judgment is that the motion to dismiss the indictment should have been sustained on the ground that prosecution for the alleged offense was barred by limitation. Section 53(a) (1) of the Internal Revenue Code of 1939 provides that returns made on the basis of the calendar year shall be made on or before March 15th following the close of the calendar year; and section 53 (a) (2) provides that the Commissioner of In-

ternal Revenue may grant a reasonable extension of time not to exceed six months for filing returns, under such rules and regulations as he may prescribe with the approval of the Secretary of the Treasury. 26 U.S.C.A. 1952 ed. §53(a) (1) (2). Section 3791(a) (1) empowers the Commissioner, with the approval of the Secretary, to prescribe and publish all needful rules and regulations for the enforcement of the Code. 26 U.S.C.A. 1952 ed. §3791. Treasury Regulations, section 39.53-2, promulgated under section 3791(a) (1) of the Code, provides among other things that authority for granting extensions of time for filing income tax returns is thereby delegated to the various district directors of internal revenue. And section 39.53-4 provides that the due date is the date on or before which a return is required to be filed in accordance with the provisions of the Code and the regulations prescribed thereunder or the last day of the period covered by an extension of time granted by the Commissioner or a district director of internal revenue. Appellant seasonably made three successive requests for extension of time within which to make his return for the year 1951. The last request was for an extension to September 15, 1952. All of such requests were granted by the director of internal revenue for the district of Colorado. Regulations promulgated for the enforcement of revenue legislation must be sustained unless unreasonable and plainly inconsistent with controlling statutes. Fawcus Machine Co. v. United States, 282 U.S. 375; Commissioner v. South Texas Lumber Co., 333 U.S. 496. The regulation delegating to the various district directors of internal revenue power to grant extensions of time for the filing of returns is reasonably adapted to the effective administration of revenue legislation. It is not inconsistent with any controlling statute. And it is effective. The three extensions granted by the director of internal revenue, considered as a whole, effectively extended to September 15, 1952, the time for the filing of the return for the year 1951. That became the due date on which the return was required to be

filed. There was no default in the filing of the return prior to that time.

Section 3748(a) of the Internal Revenue Code of 1939, provides in effect that no person shall be prosecuted for an offense arising under the internal revenue laws unless the indictment is returned or the information filed within three years next after the commission of the offense. The indictment was returned on September 14, 1955, one day less than three years after the due date for the making of the return for the year 1951, and therefore prosecution for the alleged offense was not barred by the statute of limitation. Bowles v. United States, 73 F. (2d) 772, certiorari denied, 294 U.S. 710.

The sufficiency of the evidence to establish wilfulness in failing to make the return on or before the due date is challenged. Wilfulness is an essential element of the offense charged in the indictment and it was incumbent upon the government to establish such element. But it could be established by proof of facts and circumstances from which the inference could reasonably be drawn that the failure to make the return on or before the due date was wilful. Hooper v. United States, 216 F.(2d) 684. These facts were stipulated or evidence was adduced tending to prove them. Appellant is an attorney at law and a registered accountant. He maintained offices in Denver, Colorado, and much of his professional practice related to tax matters. He knew that he was required to make annual income tax returns. For the years 1946 to 1952, inclusive, he obtained extensions of time for the making of his returns but in each instance he failed to make the return within the extended period. All of the returns for those years were made on September 22, 1953. He made declarations of estimated tax during such years. But the total amount of income tax liability which accrued was almost twice the amount paid during such years. Identical affidavits were attached to the several returns made in September, 1953. The substance

of the affidavits and the substance of the testimony of appellant given at the trial was that due to heavy professional and domestic responsibilities, he failed to make the returns within the due time. Appellant applied himself with painstaking diligence consuming long hours to his professional engagements and he devoted much time to his domestic responsibilities. But he took part in civic affairs. He served on a school board. He played golf somewhat infrequently. He occasionally attended meetings of bar associations. And he participated in political activities. Considered as a whole, the evidence together with the inferences fairly to be drawn therefrom was sufficient to warrant a finding that the failure to make the return for 1951 within the extended period was not due to mere inadvertence, oversight, or neglect, but was purposeful, deliberate, and wilful. In other words, the evidence was sufficient to establish the essential element of wilfulness in failing to make the return on or before the expiration of the last extension of time therefor.

Another complaint urged relates to an instruction given to the jury. The pertinent part of the instruction was couched in this language: "Now, the word 'wilful' has a number of different meanings depending upon the context in which it is used. As it is used in the subsection with which we are dealing here today 'wilful' means voluntary, purposeful, deliberate, and intentional as distinguished from accidental, inadvertent or negligent. The Government must prove beyond a reasonable doubt that the defendant's failure to file the return was voluntary, purposeful, deliberate, and intentional and not accidental, inadvertent or negligent. The jury is instructed that this is a criminal proceeding and that the word 'wilful' when used in a criminal statute means an act done with bad purpose or done without justifiable excuse or done stubbornly or obstinately, perversely or with bad motive. I instruct you then that the only bad purpose or bad motive which it is

necessary for the Government to prove in this case is the deliberate intention not to file a return which the Defendant knew ought to be filed so that the Government would not know the extent of his liability." The level of the argument in support of the asserted vice in the instruction is that in substance it charged the jury that while bad purpose was an essential element of the offense the fact that appellant was late in the filing of his return was all that was necessary to constitute wilfulness. It is said that insofar as the instruction undertakes to define wilfulness, it tends to write wilfulness out of the statute. The instructions must be considered as a whole. All the parts thereof must be considered together. Excerpts or particular parts are not to be separated and considered apart from the whole. Graham v. United States, 120 F.(2d) 543; Moffitt v. United States, 154 F. (2d) 402, certiorari denied, 328 U.S. 853; Lunsford v. United States, 200 F.(2d) 237. Considered in that manner, the instructions made it crystal clear to the jury that the elements of the offense laid in the indictment which must be proved beyond a reasonable doubt were that the defendant was required to file an income tax return for the year 1951; that he did not file a return on or before September 15, 1952; and that his failure to file such a return was purposeful, deliberate, and intentional and not accidental, inadvertent, or negligent. And the particular instruction presently challenged defined with correctness and clarity the meaning of wilfulness and pinpointed in a manner which could not be misunderstood the requirement that it be proved beyond a reasonable doubt. We perceive no error in the instruction. United States v. Murdock, 290 U.S. 389; Hooper v. United States, supra; Yarborough v. United States, 230 F.(2d) 56, certiorari denied, 351 U.S. 969.

Finally, reversal of the judgment is sought for refusal of the court to give to the jury two requested instructions. The substance of one of the instructions was that the late

filing of an income tax return required by law or regulations did not of itself constitute the offense charged in the indictment. And the substance of the other was that the word "wilfully" means more than voluntarily and intentionally; and that it means an act done with bad purpose and evil motive. The instructions of the court fairly and adequately covered all of the issues in the case and it is the well settled rule that a court is not required to give a requested instruction even though it is a correct statement of applicable law if the subject matter to which it refers has been appropriately covered in the general instructions given. Martin v. United States, 100 F.(2d) 490, certiorari denied, 306 U.S. 649, 651; Troutman v. United States, 100 F.(2d) 628; Hancey v. United States, 108 F.(2d) 835; Berenbeim v. United States, 164 F.(2d) 679, certiorari denied, 333 U.S. 827; Thayer v. United States, 168 F.(2d) 247; Heath v. United States, 169 F.(2d) 1007.

The judgment is AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 967

CHARLES A. HASKELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 29–36) is reported at 241 F. 2d 790.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1957. (Pet. App. 29.) A petition for rehearing was denied on March 5, 1957. By leave of court, a second petition for rehearing was filed on March 26, 1957, and denied on April 5, 1957. By order of Mr. Justice Whittaker, dated March 26, 1957, the time within which to petition for certiorari was extended to May 4, 1957. The petition was filed on May 3, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the jury was properly instructed on the element of wilfulness.

2. Whether the prosecution was barred by the statute of limitations.

3. Whether the indictment failed to state an offense under the applicable statute.

STATUTES AND REGULATIONS

Internal Revenue Code of 1939:

SEC. 51. INDIVIDUAL RETURNS.

(a) *Requirement.* Every individual having for the taxable year a gross income of $600 or more shall make a return, which shall contain or be verified by a written declaration that it is made under the penalties of perjury. Such return shall set forth in such cases, and to such extent, and in such detail, as the Commissioner with the approval of the Secretary may by regulations prescribe, the items of gross income and the deductions and credits allowed under this chapter and such other information for the purpose of carrying out the provisions of this chapter as may be prescribed by such regulations.

* * * * *

(26 U. S. C. 1952 ed., Sec. 51.)

SEC. 53. TIME AND PLACE FOR FILING RETURNS.

(a) *Time for filing.*—

(1) *General Rule.*—Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. * * *

(2) *Extension of Time.*—The Commissioner may grant a reasonable extension of time for

filing returns, under such rules and regulations as he shall prescribe with the approval of the Secretary. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

* * * * *

(26 U. S. C. 1952 ed., Sec. 53.)

SEC. 145. PENALTIES.

(a) *Failure to file returns, submit information, or pay tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145 (a).)

SEC. 3748. PERIODS OF LIMITATION.

(a) *Criminal prosecutions.*—No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission

of the offense, except that the period of limitation shall be six years—

* * * * *

(26 U. S. C. 1952 ed., Sec. 3748 (a).)

SEC. 3791. RULES AND REGULATIONS.

(a) *Authorization.*—

(1) *In general.*—Except as provided in * * * the Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3791 (a) (1).)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.53–2. *Extensions of Time for Filing Returns.*—It is important that the taxpayer render on or before the due date a return as nearly complete and final as it is possible for him to prepare. However, the Commissioner is authorized to grant a reasonable extension of time for filing returns under such rules and regulations as he shall prescribe with the approval of the Secretary. Accordingly, authority for granting extensions of time for filing income tax returns is hereby delegated to the various collectors of internal revenue. Application for extensions of time for filing income tax returns should be addressed to the collector of internal revenue for the district in which the taxpayer files his returns and must contain a full recital of the causes for the delay. Except in the case of taxpayers who are abroad,

no extension for filing income tax returns may be granted for more than six months. * * *

* * * * *

SEC. 29.53–4. *Due Date of Return.*—The due date is the date on or before which a return is required to be filed in accordance with the provisions of the Internal Revenue Code, * * * or the last day of the period covered by an extension of time granted by the Commissioner or a collector. * * *

* * * * *

STATEMENT

On September 14, 1955, an indictment in one count was returned against petitioner in the United States District Court for the District of Colorado, charging wilful failure to file an income tax return for the year 1951 in violation of Section 145 (a) of the Internal Revenue Code of 1939. The indictment reads, in pertinent part, as follows (R. 3):

> That during the calendar year 1951, [petitioner] * * * had and received a gross income of $43,518.75; that by reason of such income he was required by law, after the close of the calendar year 1951 and on or before September 15, 1952, to make an income tax return to the Collector of Internal Revenue for the Internal Revenue Collection District of Colorado, * * * stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said Collector of Internal Revenue, or to any other proper officer of the United States.

In violation of Section 145 (a), Internal Revenue Code; 26 U. S. C., Section 145 (a).

After a jury trial, petitioner was found guilty as charged. (R. 6.) On May 25, 1956, he was sentenced to imprisonment for a period of six months and to pay a fine of $5,000. (R. 6.) The Court of Appeals affirmed (Pet. App. 36.)

The evidence to support the verdict may be summarized as follows:

Petitioner has been engaged in the practice of law in Denver, Colorado, since 1929. In addition he has been a registered public accountant in Colorado since 1937. (R. 136.) A substantial amount of his professional work has involved federal income tax problems and the preparation of tax returns for clients. (R. 48, 51–52, 56–57, 60, 76, 83). During the years 1946, through 1953, petitioner was active in civic work and served on the local school board (R. 123–125). He also took part in numerous political activities. (R. 146–147.)

It is undisputed (Pet. 7) that petitioner's gross income and tax liability for the year 1951 exceeded $43,000 and $10,000, respectively.[1] Petitioner requested and the Collector (now District Director) of Internal Revenue granted three extensions of time in which to file his 1951 income tax return. The second extension ran until July 15, 1952. Petitioner's third application for an extension of time was dated July 15 and received by the Collector on July 16, 1952. On

[1] The prosecution established by independent evidence that petitioner's gross income for 1951 was at least $39,501. (R. 94–99, 112.)

July 21, 1952, the Collector granted a "final" extension until September 15, 1952. (R. 55–57.) The petitioner failed to file an income tax return on or before September 15, 1952.

It has been stipulated that petitioner's gross income for the years 1946, 1947, 1948, 1949 and 1950 was $19,630, $14,330, $29,307, $18,228 and $35,575, respectively. (R. 63; Exs. 2–6.) His total tax liability for the same years exceeded $16,000. With respect to each of the aforementioned years, petitioner requested and was granted extensions of time to the full extent allowed by law within which to file his income tax return but failed to file a return for any of these years within the extended periods or at any other time prior to September 22, 1953. (R. 45–57.)

On September 14, 1953, petitioner was approached by the Assistant District Director of Internal Revenue for the District of Colorado, Thomas B. Lynch, and asked (R. 74–75) "is it possible you didn't file a return for this year", the reference being to the year 1951, "[w]e don't have a record of your having filed". Petitioner's reply (R. 75) was "I am working on it now, and I am going to have them in here next week." Thereafter, on September 22, 1953, petitioner filed income tax returns for each of the years 1946 through 1952. (R. 45.) The returns were accompanied by an affidavit of petitioner (R. 60–62) which recited in substance that his failure to file returns for the years 1946 through 1951 was due to the pressure of business engagements. In the affidavit, he compared his "situation" to that of "the shoeless shoemaker's child".

Petitioner filed a declaration of estimated tax for 1951 in which he reported an estimated tax liability for the year of $5,468. The declaration of estimated tax was filed on December 19, 1951 and was accompanied by a payment of $3,500. During the year 1951, income tax in the amount of $2,024 had been withheld from petitioner's earnings. The balance due on his tax liability for 1951, exclusive of interest and penalties, exceeded $5,000. (R. 46, 63, Exs. 1, 8.) No declaration of estimated tax was filed by petitioner for the years 1946, 1947 and 1948.[2] On January 16, 1950, he filed a declaration of estimated tax for 1949, reflecting a tax liability of $650 and accompanied by a remittance in the amount of $550, and on January 15, 1951, he filed one for 1950 showing a tax liability of $4,900 and accompanied by a payment of $2,742. Income tax had been withheld from petitioner's earnings during 1949 and 1950 in the amounts of $73, and $2,158, respectively. (R. 46, Exs. 5, 6, 9, 10.) It is undisputed (Pet. 7) that the unpaid balance of petitioner's tax liability for the years 1946 through 1950 totaled in excess of $8,000.

Petitioner's defense was lack of wilfulness. He testified (R. 141–143) that his failure to file a timely return for 1951 and prior years was due to the pressure of business and a heavy work load, "a trial, a trip, a business matter or clients, things that just cannot be set aside." However, he admitted on cross

[2] His wife filed a declaration of estimated tax for the year 1946 in which she reported an estimated tax liability of $82. (R. 46, Ex. 2.)

examination that he had found time during the period in question to engage in golf tournaments, social functions, bar association conventions, and civic and political activities. (R. 144–148.)

The court instructed the jury, in part, as follows (R. 168–170):

> Now, as you will recall, the evidence further shows that the defendant in this case secured extensions of time to September 15, 1952, within which to file his return for the calendar year 1951. I wish to instruct you, if you believe beyond a reasonable doubt that the defendant had a gross income of $600.00 or more for the calendar year of 1951, then as a matter of law he thus was required to file a return for such calendar year on or before September 15, 1952.
>
> * * * * *
>
> Now, the second thing that the Government is required to prove beyond a reasonable doubt is that the defendant did not file a return for the calendar year of 1951 within the time provided by law which in this case was on or before September 15, 1952, and, third, that defendant's failure to file a return was knowing and wilful.
>
> * * * Now, the word "wilful" has a number of different meanings depending upon the context in which it is used. As it is used in the subsection with which we are dealing here today "wilful" means voluntary, purposeful, deliberate, and intentional as distinguished from accidental, inadvertent or negligent. The Government must prove beyond a reasonable doubt that the defendant's failure to file the return

> was voluntary, purposeful, deliberate, and intentional and not accidental, inadvertent or negligent. The jury is instructed that this is a criminal proceeding and that the word "wilful" when used in a criminal statute means an act done with a bad purpose or done without justifiable excuse or done stubbornly or obstinately, perversely with a bad motive. I instruct you then that the only bad purpose or bad motive which it is necessary for the Government to prove in this case is the deliberate intention not to file a return which the defendant knew ought to be filed so that the Government would not know the extent of his liability.

Petitioner objected (R. 163, 173) to that portion of the charge in which the court instructed the jury that—

> * * * the only bad purpose or bad motive which is necessary for the Government to prove on the issue of willfulness is the deliberate intention not to file a return which the defendant knew ought to have been filed so that the Government would not know the extent of the liability.

Prior to trial, petitioner moved to dismiss the indictment on two grounds: One, that the prosecution was barred by the statute of limitations; and two, that the indictment failed to state an offense under Section 145 (a). (R. 4.) At the hearing on the motion (R. 8–41), petitioner argued (R. 8–24), in support of the first ground, that his return for 1951 was due on or before March 15, 1952; that the applicable three year statute of limitations commenced to run after that date; that (R. 19) "no extension granted by any collector of internal revenue * * *

affected * * * the running of this Statute of Limitations"; and that since the indictment was not returned within three years of March 15, 1952, the prosecution was barred. In support of the second ground, petitioner argued (R. 24–41) that the indictment was fatally defective since it did not charge a failure to file both a declaration of estimated tax and a return. The court denied the motion to dismiss. (R. 5, 39.)

ARGUMENT

1. Petitioner contends (Pet. 11–17) that the instruction on wilfulness, *supra*, equated "mere voluntary failure to act with the 'willful failure' which is proscribed by the statute"; and that the instruction was "confusing and ambiguous", and "actually eliminated willfulness as an element of the offense" in that the jury was charged that the only bad purpose or bad motive necessary was the deliberate intention not to file a return. This being so, he argues that the instruction contained the vice which this Court struck down in *Murdock* v. *United States*, 290 U. S. 389. It is apparent from a reading of the challenged instruction that petitioner's contention lacks substance and amounts to nothing more than an artful lifting of words out of context.

In asserting that the instruction equated voluntary with wilful, petitioner ignores the context in which the words were used, for in defining wilful as meaning "voluntary, purposeful, deliberate and intentional", the court, at that point in the instruction, was merely distinguishing a wilful failure from an "accidental, inadvertent or negligent" one. Nor was the

jury charged that the only bad motive or purpose necessary was a deliberate intention not to file a return. The requisite bad purpose or evil motive was spelled out for the jury in the added language "so that the Government would not know the extent of his liability". This language was approved by the Court of Appeals for the Fourth Circuit in *Yarborough* v. *United States,* 230 F. 2d 56, certiorari denied, 351 U. S. 969.

Petitioner's reliance upon *Murdock* v. *United States, supra,* is misplaced. The charge in the *Murdock* case in effect withdrew from the jury the issue of wilfulness and was tantamount to a directed verdict of guilty. Here, as the court below observed (Pet. App. 35), the instruction complained of "defined with correctness and clarity the meaning of wilfulness and pinpointed in a manner which could not be misunderstood the requirement that it be proved beyond a reasonable doubt."

2. Petitioner's contention (Pet. 19–23) that prosecution of the offense charged was barred by the applicable statute of limitations, Section 3748 (a) of the Internal Revenue Code of 1939, *supra,* is without merit. This contention is based upon the erroneous premise that the granting by the Collector of an extension of time within which to file a return, as provided by Section 53 (a) (2) of the Internal Revenue Code of 1939, *supra,* did not have the effect of extending the due date of the return for purposes of the running of the statute of limitations. Treasury Regulations 111, Sec. 29.53–4, *supra,* promulgated under

the Internal Revenue Code of 1939 and in effect during the period in question, specifically provides that the due date of the return, in case an extension of time for filing is granted is "the last day of the period covered by an extension". As the court below noted (Pet. App. 32), since this regulation is neither unreasonable nor plainly inconsistent with the revenue statutes, it must be sustained. *Commissioner* v. *South Texas Lumber Co.*, 333 U. S. 496.

Here, petitioner requested and received successive extensions of time within which to file a return for 1951, the effect of which under the regulations, *supra*, was to extend the due date of the return until September 15, 1952. It is therefore apparent that the offense charged in the indictment could not have been consummated prior to the above date, and since, under Section 3748 (a), the three year statute of limitations does not commence to run until the offense is committed, the indictment, having been returned on September 14, 1955, was timely.

3. Finally, petitioner contends (Pet. 18–19) that the indictment is fatally defective in three respects: First, the word "regulations" has been omitted from the indictment whereas the language of the statute, Section 145 (a), supra, is "law or regulations"; secondly, the indictment "charges but half a crime" since the offense proscribed by the statute is a wilful failure to file a return *and* declaration of estimated tax and the indictment charges only a failure to file a return; and thirdly, the indictment does not aver that petitioner failed to file a return at the time or times required by law which is the offense defined by the statute. None of these contentions is meritorious.

With respect to the first objection, the indictment, *supra*, charged that petitioner "was required by law" to file an income tax return for 1951 on or before September 15, 1952. To have added to the above quoted phrase the statutory language "or regulations made under authority thereof" would have been mere surplusage, since such regulations, if valid, have the force and effect of law. *Maryland Casualty Co.* v. *United States*, 251 U. S. 342. Petitioner's second objection is based upon a misconstruction of the statute, the language of which is in the disjunctive and not the conjunctive. Section 145 (a) defines as separate offenses the wilful failure to file a return *or* declaration of estimated tax. See *Spies* v. *United States*, 317 U. S. 492; *Murdock* v. *United States, supra*. The third objection ignores the plain language of the indictment, *supra*.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 967

CHARLES A. HASKELL, *Petitioner*
vs.
UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

We believe that a reply herein is appropriate to point out that the concessions and default in argument on the part of the Government in its Brief in Opposition establish that petitioner was wrongfully convicted under circumstances calling for the exercise of this Court's discretion to review. We address ourselves to two points only.

POINT 1

The Government concedes that a bad purpose or evil motive is essential to constitute willfulness (Gov't. p. 11 and 12) and asserts that the Trial Court's instruction spelled out the requisite bad purpose or evil motive by the addition of the words "so that the Government would not know the extent of his liability". Yet the Government introduced evidence of returns filed with petitioner's knowledge and concurrence and received by the Government prior to the time petitioner's individual return was ever due (R. 94-95, Gov't. Ex. 12, Exs. p. 51, R. 44; and lines 2 and 6A of Gov't. Ex. 1, Exs. p. 1, R. 44), which disclosed income

greater than that upon which petitioner was finally taxed. (Gov't. Ex. 1, Exs. p. 1, R. 44) (payment received, R. 46).

POINT 2

The Government rests its case as to the timeliness of the prosecution upon the assertion that the offense charged could not have been consummated prior to September 15, 1952 (Gov't. 13) yet concedes that petitioner failed to file his return or secure a further extension prior to the expiration of his second extension on July 15, 1952 (Gov't. p. 6 and 7). The Government attempts to avoid meeting this question by ignoring it, and also attempts to avoid the lack of authority in the Collector to grant the purported third extension by ignoring and omitting 26 C.F.R. 601.12. But the facts are admitted, and the Government's default on this issue plainly bespeaks its knowledge that it cannot sustain the conviction against the Statute of Limitations.

CONCLUSION

Without referring to any other defects in the Government's Brief it is apparent that the Government has totally failed to answer the questions raised by the Petition for Certiorari and that the petition should in all justice, be granted.

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